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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. EMILIO PINEDA SALAZAR, Petitioner.	2 CA-CR 2010-0296-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092215001

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Barton & Storts, P.C.
By Brick P. Storts, III
Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Petitioner Emilio Salazar seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged the court had failed to advised him of the effect of his guilty plea on his immigration status as required by Rule 17.2(f), Ariz. R. Crim. P., and that as a result, he had not entered his plea knowingly, voluntarily, and intelligently. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Because he failed to comply with Rule 32.5, Salazar has not sustained his burden of establishing such abuse here.

Background

¶2 Pursuant to a plea agreement, Salazar, a Mexican citizen, was convicted of second-degree child molestation and aggravated assault of a peace officer and was sentenced to a total of five years' imprisonment. Thereafter, Salazar petitioned for post-conviction relief, arguing the trial court had violated Rule 17.2(f), which requires that "[b]efore accepting a plea . . . the court shall address the defendant personally in open court, informing him or her . . . [t]hat if he or she is not a citizen of the United States, the plea may have immigration consequences." Relying on the United States Supreme Court's recent decision in *Padilla v. Kentucky*, ___U.S.___, 130 S. Ct. 1473 (2010), he also asserted that, because he had not been so advised, his plea had not been knowing, voluntary, and intelligent.

¶3 The trial court ruled that Salazar had not been advised by the court of the plea's effect on his immigration status and that the court's failure to comply with Rule

17.2(f) had been error. It did not specifically address his argument based on *Padilla*. Pointing out that a Rule 17.2 violation does not necessarily require a plea to be vacated, the court concluded Salazar had not been prejudiced and therefore was not entitled to relief. Specifically, it found that Salazar had read and signed his plea agreement in consultation with his attorney and that the court had "reviewed the possible range of sentences with [him] during the change of plea colloquy." And it ruled that advising Salazar of the possible immigration consequences of his plea "would have done nothing to inform [him] as to what sentence would ultimately be pronounced" and that omitting the advisement "did not relate to a provision of the plea affecting the computation of [his] sentence."

Discussion

¶4 In his petition for review, again relying on *Padilla*, Salazar asserts that the trial court's conclusion that he had not been prejudiced "negate[d] the importance of immigration status to a non-citizen defendant." Quoting *Padilla*'s broad language that the immigration consequences resulting from a conviction may "'sometimes [be] the most important part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes,'" ___U.S. at ___, 130 S. Ct. at 1480, he argues he "has a protected liberty or property interest in the benefit of remaining in the United States absent his removal by and with the exercise of due process."

¶5 In *Padilla*, the Supreme Court addressed "whether, as a matter of federal law, Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country." ___U.S. at ___, 130 S.

Ct. at 1478. Citing its "longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country" the Court concluded that "counsel must inform [his or] her client whether his [or her] plea carries a risk of deportation." *Id.* at ___, 130 S. Ct. at 1486. Salazar argues that under *Padilla*, "[i]f the plea . . . *will* result in the Petitioner's deportation, the Petitioner must be made aware of that fact" as part of the plea colloquy.[1]

¶6 We cannot accept Salazar's broad reading of *Padilla*. Despite the Court's broad language about the perils of criminal convictions to non-citizen defendants, it did not ultimately resolve "[t]he disagreement over how to apply the direct/collateral [consequences] distinction." *Id.* at ___ n.8, 130 S. Ct. at 1481 n.8. That distinction underlies Arizona's caselaw which preceded the enactment of Rule 17.2(f), *see* 208 Ariz. L-LI (2004), and provided that due process does not require a defendant to receive a warning about the consequences of a plea on his or her immigration status. *See, e.g., State v. Strohson*, 190 Ariz. 120, 125, 945 P.2d 1251, 1256 (1997); *Martin v. Reinstein*, 195 Ariz. 293, ¶ 92, 987 P.2d 779, 805 (App. 1999); *State v. Vera*, 159 Ariz. 237, 238-39, 766 P.2d 110, 111-12 (App. 1988). Thus, we cannot say the *Padilla* court overruled Arizona's existing law that due process did not require such a warning by the trial court. Its holding related only to claims of ineffective assistance of counsel.

[1]Despite stating that counsel had not advised him of the immigration consequences of his plea, Salazar does not make a separate argument that counsel was ineffective in failing to do so, nor did he make that argument below.

¶7 We agree with the trial court that even if a warning was not required by due process, the court violated Rule 17.2(f) by failing to advise Salazar of the possible immigration consequences of his plea. *Cf. State v. Ellis*, 117 Ariz. 329, 333, 572 P.2d 791, 795 (1977) ("[W]hen the mandates of *Boykin*[[2]] . . . have been met we can say that under constitutional standards the plea has been intelligently made. The next step is to examine the plea in the light of Rule 17.2(b)."). Rule 17.2(f) clearly sets forth a warning a trial court is required to give a pleading defendant before accepting his or her plea of guilty. That warning was not given here.

¶8 As the trial court pointed out, however, a failure to comply with the requirements of Rule 17.2 does not always require that the resulting plea be vacated. *See State v. Denney*, 130 Ariz. 128, 130, 634 P.2d 579, 581 (1981); *cf. State v. Carter*, 216 Ariz. 286, ¶ 18, 165 P.3d 687, 691 (App. 2007) (stating resentencing not automatically required and reviewing for fundamental error when defense counsel stipulated to prior conviction without Rule 17.2 colloquy).

> [A] defendant should not be allowed to vacate a plea bargain unless the information he lacked was actually relevant to the decisionmaking process. Where the missing information does not go to defendant's essential objective in making the agreement, where it involves secondary or minor terms collateral to the decision to plead, and where it is not "of the essence" of the agreement, it is in the public interest that the agreement be enforced.

State v. Crowder, 155 Ariz. 477, 481, 747 P.2d 1176, 1180 (1987) (citation omitted).

[2]*Boykin v. Alabama*, 395 U.S. 238 (1969).

Thus, as a general matter, to obtain reversal of his plea, a defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004); *see also Carter*, 216 Ariz. 286, ¶ 20, 165 P.3d at 691 (defendant who did not receive Rule 17 colloquy before stipulating to prior conviction "generally must establish that had the required colloquy been given, he would not have stipulated").

¶9 In view of the above standards, we disagree with the trial court's ruling as to what Salazar was required to show in order to establish prejudice. Relying on *Denney*, the court apparently concluded that a violation of Rule 17.2 was only reversible error if the defendant was "unaware of a provision affecting the computation of the sentence or date of parole." But, *Denney* and the cases on which it relied dealt with violations of Rule 17.2(b), which requires a trial court to advise a defendant of "[t]he nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute," not Rule 17.2(f), which was added after those cases were decided. *See* 208 Ariz. L-LI. Thus, the grounds for reversal in those cases related to the issues set forth in Rule 17.2(b) on which the defendant had not been advised—issues related to the defendant's possible sentence.

¶10 In the context of a failure to give the warning required by Rule 17.2(f), the trial court should have considered whether the failure to receive that information was relevant and essential to Salazar's decision to enter a plea. *See Crowder*, 155 Ariz. at 481, 747 P.2d at 1180. Although, as noted above, due process does not require a court to warn a defendant about the immigration consequences of his or her plea, *Martin*, 195

Ariz. 293, ¶ 92, 987 P.2d at 805, circumstances may be presented in which those consequences, although collateral to the plea, may be sufficiently relevant to the defendant's decision-making process such that a violation of Rule 17.2(f) will require reversal.

¶11 We also disagree with the trial court's apparent reliance on Salazar's having read and consulted with his attorney about his plea agreement. Neither the plea agreement nor anything else in the record informed Salazar of the immigration consequences of his plea before it was accepted by the trial court. *Cf. State v. Rodriguez*, 25 Ariz. App. 111, 113, 541 P.2d 574, 576 (1975) (accepting plea as voluntary where "entire record" showed defendant made knowing and voluntary waiver of rights). We nevertheless, however, uphold the court's summary dismissal of Salazar's petition.

¶12 Salazar failed to present a colorable claim entitling him to an evidentiary hearing because he did not comply with the requirements of Rule 32.5. That rule requires that a defendant note facts "within [his] personal knowledge . . . under oath," which generally is accomplished by affidavit. Ariz. R. Crim. P. 32.5. A document entitled "affidavit" containing Salazar's claim that he would not have pled guilty had he known "[his] immigration status could be affected by [his] admissions of guilt" was attached to his petition for post-conviction relief. But, that document was unsigned and unsworn. Unsworn statements do not take the place of the affidavit or other sworn statement required to establish a colorable post-conviction claim warranting an evidentiary hearing. *See State v. Borbon*, 146 Ariz. 392, 399, 706 P.2d 718, 725 (1985) (unsubstantiated claim witness would give favorable testimony does not compel evidentiary hearing); *State v.*

Donald, 198 Ariz. 406, ¶ 17, 10 P.3d 1193, 1200 (App. 2000) (to obtain post-conviction evidentiary hearing, defendant should support allegations with sworn statements). A bare allegation of prejudice without supporting evidence is insufficient to create a colorable claim. *See Donald*, 198 Ariz. 406, ¶ 17, 10 P.3d at 1200.

Disposition

¶13 Although we grant Salazar's petition for review, we deny relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge